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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1970

Supreme Court, U.S.
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No. 412

KAL W. LINES, Trustee in Bankruptcy of the Estates of Kenneth Robert Frederick, Bankrupt, and Clarence Harris, Bankrupt,

*Petitioner,*

vs.

KENNETH ROBERT FREDERICK, CLARENCE HARRIS, Bankrupts,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

LAWRENCE GOLDBERG,
1 Montgomery Street,
San Francisco, California 94104,
*Counsel for Petitioner, Kal W. Lines, Trustee in Bankruptcy of the Estates of Kenneth Robert Frederick, Bankrupt, and Clarence Harris, Bankrupt.*

GLICKSBERG, KUSHNER & GOLDBERG,
BURTON I. MEYER,
1 Montgomery Street,
San Francisco, California 94104,
*Of Counsel.*

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*Petitioner,*

vs.

KENNETH ROBERT FREDERICK, CLARENCE HARRIS, Bankrupts,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI
## to the United States Court of Appeals for the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of

Appeals for the Ninth Circuit entered in the above entitled matter on April 21, 1970.

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## CITATIONS TO OPINIONS BELOW

The orders entered by the District Court for the Northern District of California which were appealed to the Court of Appeals for the Ninth Circuit are not reported. They are printed in Appendix "A" hereto, *infra,* p. xi, and may be found in the record at R. I, p. 46 and R. II, p. 51.[1]

The opinion of the Court of Appeals for the Ninth Circuit is printed in Appendix "B" hereto, *infra,* p. xviii, and is unreported at this time.

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## JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 21, 1970 and is printed in Appendix "B" hereto, *infra,* p. xxiii. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

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[1]The record in this case consists of 3 volumes and various exhibits as certified and transmitted by the Court of Appeals. References to the numbered volumes are by volume and page, e.g. (R. I, p. 17).

## STATUTES AND RULES INVOLVED

The sole statutory provision involved herein is Bankruptcy Act §70a(5), 11 U.S.C. §110a(5).

Said statute states:

> "The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located . . . (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered. . . ."

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## STATEMENT OF CASE

Petitioner is the trustee in bankruptcy of the individual estates in bankruptcy of respondents, Kenneth Robert Frederick and Clarence Harris. The two combined cases present the identical legal question, but since the facts of each case are somewhat different, the cases will be separately stated herein.

In order to aid this Court in considering the within petition, the Stipulation as to Facts, entered into

between the attorneys for petitioner and the attorneys for each respondent, and filed with the Referee in Bankruptcy on January 31, 1968, are each set forth in full, as follows:

KENNETH ROBERT FREDERICK, Bankrupt

"1. That the bankrupt filed his petition in bankruptcy on September 15, 1967, in the above-entitled Court, and on said date was duly adjudged a bankrupt.

"2. That KAL W. LINES was duly appointed the trustee of the estate of the bankrupt, and thereafter duly qualified, and now remains the duly appointed, qualified and acting trustee of said estate.

"3. That as of the date of bankruptcy on September 15, 1967, the bankrupt was employed by Litton Industries, in San Carlos, California, and that as of said date the bankrupt had accrued and earned wages due to him in the sum of $137.28, all of which sum represented wages earned within 30 days next preceding the filing of the bankruptcy petition herein; and that as of the date of bankruptcy the bankrupt owed debts incurred by him for the common necessaries of life within the meaning of the provisions of §690.11 of the California Code of Civil Procedure.

"4. That as of the date of bankruptcy on September 15, 1967, the bankrupt had accrued and earned vacation pay to his credit in the sum of $137.28, of which sum $31.20 represented vacation pay accrued and earned within 30 days next preceding the filing of the bankruptcy petition herein;

"That had the bankrupt terminated his employment as of the date of bankruptcy he would have been entitled to receive, and would have received, the full amount of said accrued and earned vacation pay which had been accrued and earned as of the date of bankruptcy, to-wit: the sum of $137.28.

"That had the bankrupt not terminated his employment as of the date of bankruptcy or any other time, but had instead remained in the employ of Litton Industries, the bankrupt would have received his accrued and earned vacation pay at the time when Litton Industries normally closes down its plant, and at which time all employees of Litton Industries take their vacation, and at which time said employees received their accrued and earned vacation pay with respect to said vacation period. In late December, 1967, and early January, 1968, Litton Industries closed down its plant for the vacation period, at which time all of the employees of Litton Industries, including the bankrupt, took their vacation. At that time, the bankrupt received his vacation pay which included the said sum of $137.28, which sum the bankrupt had accrued and earned as of the date of bankruptcy on September 15, 1967."

● Clarence Harris, Bankrupt

"1. That the bankrupt filed his petition in bankruptcy on August 31, 1967, in the above-entitled Court, and on said date was duly adjudged a bankrupt.

"2. That KAL W. LINES was duly appointed the trustee of the estate of the bankrupt, and thereafter duly qualified, and now remains the

duly appointed, qualified and acting trustee of said estate.

"3. That as of the date of bankruptcy on August 31, 1967, the bankrupt was employed by Pacific Gas & Electric Company, San Francisco, California, and that as of said date the bankrupt had accrued and earned wages due to him in the sum of $102.04, all of which sum represented wages earned within 30 days next preceding the filing of the bankruptcy petition herein, and that as of the date of bankruptcy the bankrupt owed debts incurred by him for the common necessaries of life within the meaning of the provisions of §690.11 of the California Code of Civil Procedure.

"4. That as of the date of bankruptcy on August 31, 1967, the bankrupt had accrued and had been credited with vacation time, the monetary equivalent of which was the sum of $144.14, of which $20.59 represented accruals credited within 30 days next preceding the filing of the bankruptcy petition herein;

"That had the bankrupt terminated his employment as of the date of bankruptcy, he would have been entitled to receive, and would have received, a cash payment representing said vacation accruals, to-wit: the sum of $144.14;

"That the bankrupt has not terminated his employment with Pacific Gas & Electric Company;

"That the bankrupt would be entitled to receive said accrued vacation pay under only two conditions: (1) he terminate his employment, or (2) that at some date after January 1, 1968, he actually take vacation time, in which instance

he would receive said accrued vacation pay as his compensation during said vacation period."

On January 31, 1968, the Honorable Lynn J. Gillard, Referee in Bankruptcy, made Findings of Fact, Conclusions of Law and Order Adjudging that Certain Accrued Wages and Vacation Pay of Respondents Frederick and Harris Passed to the Trustee and Turnover Order. (R. I, p. 8; R. II, p. 7.) Said Orders are printed in Appendix "A" hereto, *infra*, p. i.

Thereafter, on February 8, 1968, respondent Harris filed with the United States District Court for the Northern District of California a Petition for Review from said Order of the Referee. Respondent Frederick filed a Petition for Review on March 7, 1968. The District Court had jurisdiction to review the Orders under §39c of the Bankruptcy Act (11 U.S. C. §67c). On June 3, 1968, the District Court made its Order Affirming Referee's Orders and Denying Petitions for Review in each of said cases. Upon respondents' Petition for Allowance of Appeal, the Court of Appeals, by its Order of July 26, 1968, granted permission to the respondents to appeal from said orders of the District Court. The Court of Appeals had jurisdiction to hear the appeals under Section 24 of the Bankruptcy Act (11 U.S.C. Section 47).

On April 21, 1970, the Court of Appeals reversed the orders of the District Court. It held that title to each of the bankrupt respondent's accrued and unpaid

vacation pay did not pass to petitioner, as trustee in bankruptcy, under §70a(5) of the Bankruptcy Act.

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## QUESTIONS PRESENTED

1. Does title to a bankrupt wage earner's vacation pay, earned and accrued as of the date of bankruptcy, but payable after bankruptcy, pass to his trustee in bankruptcy, under §70a(5) of the Bankruptcy Act?

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## REASONS FOR GRANTING A WRIT

### a. Summary of Reasons.

The paramount reason for granting a writ of certiorari is that the decision rendered by the Court of Appeals for the Ninth Circuit is in conflict with the decision of the Court of Appeals for the Fifth Circuit in the case of *Kolb v. Berlin,* 356 F.2d 269 (5th Cir. 1966). Furthermore, the Ninth Circuit's decision misconceived the meaning of the decision of this Court in *Segal v. Rochelle,* 382 U.S. 375, 86 S.Ct. 511 (1966). In addition, this case raises important questions of interpretation of the Bankruptcy Act which are of a recurring nature. Because of their great importance in the administration of the estates of bankrupts, these matters should be decided by the United States Supreme Court. This is especially true because the decision of the Ninth Circuit is believed to be in conflict with an entire body of bankruptcy law interpreting §70a(5) of the Bankruptcy Act.

**b. The decision rendered by the Court of Appeals for the Ninth Circuit is in conflict with the decision of the Court of Appeals for the Fifth Circuit in Kolb v. Berlin, 356 F.2d 256 (5th Cir. 1966).**

In *Kolb, supra,* the Fifth Circuit held that the vacation pay of a bankrupt employee of the Federal government was property, as the term is defined in §70a(5) of the Bankruptcy Act. It further held that, since vacation pay was transferable under the applicable state law, it was the kind of property of a bankrupt which passed to his trustee in bankruptcy as of the date of bankruptcy under §70a(5).

Citing this Court's decision in *Segal v. Rochelle* (supra), the Fifth Circuit held that, since the bankrupt would, in any case, receive a lump sum payment of his accumulated vacation pay when he terminated his government service, his rights were not so contingent as would remove the vacation pay from the definition of property, as defined in §70a(5) of the Bankruptcy Act.

The decision of the Ninth Circuit, in the present case, is in direct conflict with *Kolb,* since the Ninth Circuit holds that earned and accrued vacation pay of a bankrupt does not pass to his trustee in bankruptcy, even though the bankrupt would, in any case, receive the vacation pay at some future date. Further, the Ninth Circuit does not deem it necessary to decide whether vacation pay is transferable under state law.

The Ninth Circuit acknowledges that its decision is contrary to that of the Fifth Circuit in *Kolb* (supra), on p. 4 of its decision (Appendix "B", p. xxii). Thus, it is clear that there is a conflict of opin-

ion among the Circuit Courts of Appeal which should be resolved by this Court.

**c. The decision of the Ninth Circuit misconceived the meaning of this Court's decision in Segal v. Rochelle, 382 U.S. 375, 86 S.Ct. 511 (1966).**

The case of *Segal v. Rochelle, supra,* heavily relied on by the Ninth Circuit, held that loss-carryback tax refunds received by a bankrupt after bankruptcy, was such property of the bankrupt as passed to his trustee in bankruptcy under the Bankruptcy Act §70a(5).

In reaching its decision, this Court stated:

> "The main thrust of §70a(5) is to secure for creditors everything of value the bankrupt may possess in alienable or leviable form when he files his petition. To this end the term 'property' has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed. E.g., Horton v. Moore, 6 Cir., 110 F.2d 189 (contingent, postponed interest in a trust); Kleinschmidt v. Schroeter, 9 Cir., 94 F.2d 707 (limited interest in future profits of a joint venture); see 3 Remington, Bankruptcy §§1177-1269 (Henderson ed. 1957)."
>
> *Segal, supra,* 382 U.S. at 379.

In *Kleinschmidt v. Schroeter,* 94 F.2d 707 (9th Cir. 1938), cited by *Segal,* the bankrupt and others entered into a joint venture to operate a mine. As of the date of bankruptcy, the bankrupt was entitled to a certain share of the profits of the joint venture. His share was based on a percentage of the amount

of money he had paid into the joint venture. He was not required to pay any additional sums of money into the joint venture, or perform any additional services after the date of bankruptcy.

After discussing the "main thrust" of §70a(5), the *Segal* decision went on to state:

> "However, limitations on the term [property] do grow out of other purposes of the Act; one purpose which is highly prominent and is relevant in this case is to leave the bankrupt free after the date of his petition to accumulate new wealth in the future."
>
> *Segal, supra,* 382 U.S. at 379.

This Court then went on to define "new wealth":

> "Accordingly, future wages of the bankrupt do not constitute 'property' at the time of bankruptcy nor, analogously, does an intended bequest to him or a promised gift—even though state law might permit all of these to be alienated in advance. E.g., In re Coleman, 87 F.2d 753; see 4 Collier, Bankruptcy, §§.70.09, 70.27 (14th ed. 1962)."
>
> *Segal, supra,* 382 U.S. at 379-380.

The property involved *In re Coleman,* 87 F.2d 753 (2nd Cir. 1937), cited by *Segal,* was the contingent fee of a bankrupt attorney. Prior to the date of bankruptcy, the attorney had entered into a retainer agreement which provided that he receive a percentage of any recovery, either by way of settlement or judgment, and no fee otherwise. However, the bankrupt did not perform his legal services and obtain a judgment until after the date of bankruptcy. Thus, the

Second Circuit held that the contingent fee recovered by the bankrupt did not pass to his trustee in bankruptcy. On the date of bankruptcy, the crucial date, the bankrupt had not yet performed the services for which he was to receive his compensation. The compensation in question was, therefore, in the nature of future wages.

Having given examples of both the kinds of property of a bankrupt which pass to his trustee under Bankruptcy Act §70a(5), and the kinds which do not, this Court concluded as follows:

> "Turning to the loss-carryback refund claim in this case, we believe it is sufficiently rooted in the pre-bankruptcy past and so little entangled with the bankrupts' ability to make an unencumbered fresh start that it should be regarded as 'property' under §70a(5)."
>
> *Segal, supra,* at 382 U.S. at 380.

It is clear that "the main thrust of §70a(5) is to secure for creditors everything of value the bankrupt may possess in alienable or leviable form when he files his petition." (*Segal,* 382 U.S. at 379.) However, the "main thrust" of the section is limited by other purposes of the Bankruptcy Act, one of which "is to leave the bankrupt *free after the date of his petition* to accumulate new wealth in the future." (*Segal, ibid.*)

Thus, property which is entangled with the bankrupt's ability to make an unencumbered fresh start does not pass to his trustee in bankruptcy. Examples of such property are future wages and the contingent

fee of an attorney, which is to be earned for services performed, in part, after the date of bankruptcy. See *In re Coleman, supra.*

It seems that the key element in determining whether something is necessary for a fresh start is whether it is "sufficiently rooted in the pre-bankruptcy past." (*Segal, supra,* 382 U.S. at 380), and, thus, should pass to the trustee, or represents "new wealth" which stems from future or post-bankruptcy activities of the bankrupt.

In its discussion of why a loss-carryback refund claim passed to the trustee in bankruptcy under the Bankruptcy Act §70a(5), this Court states what must occur by the date of bankruptcy in order for property to pass to a trustee in bankruptcy.

> "Temporally, two key elements pointing toward realization of a refund existed at the time these bankruptcy petitions were filed: taxes had been paid on net income within the past three years, and the year of bankruptcy at that point exhibited a net operating loss."
>
> *Segal, supra,* 382 U.S. at 380.

Therefore, if a bankrupt performs all acts necessary for him to earn a right to something of value, be it a loss-carryback tax refund, or vacation pay, before the date of bankruptcy, then the property is "rooted in the pre-bankruptcy past" and passes to his trustee in bankruptcy.

In the present case, the Ninth Circuit completely misinterprets *Segal v. Rochelle.* The essential facts of both the *Harris* and *Frederick* cases before this

Court, are that as the date of bankruptcy each bankrupt had accrued and earned his vacation pay. Each had an absolute right, as of the date of bankruptcy, to receive this vacation pay at the time his vacation was scheduled or, in the alternative, at the time his employment terminated. Clearly, under the Court's reasoning in *Segal*, the vacation pay should pass to the trustee in bankruptcy.

However, the Ninth Circuit does not reach this result. Seizing upon isolated words from the *Segal* opinion, it holds that vacation pay is not the kind of property which passes to a trustee in bankruptcy under §70a(5), because it is "future wages" which are necessary for a fresh start by the bankrupts. Thus, the Ninth Circuit has completely disregarded the reasoning behind *Segal*, in that it holds that vacation pay does not pass to the trustee in bankruptcy under §70a(5) of the Bankruptcy Act, even though the bankrupt employee had performed all the work necessary to earn his vacation pay before the date of bankruptcy, and as of that date, had an absolute right to receive it, albeit in the future.

Therefore, the Ninth Circuit has cited *Segal* as support of a decision which is contrary to the result, the reasoning and the specific language of the Court's decision in *Segal*. Such misinterpretation of a decision of this Court by the Ninth Circuit clearly calls for a hearing by this Court.

**d. This case raises important questions of interpretation of the Bankruptcy Act, which are of a recurring nature. Because of their great importance in the administration of the estates of bankrupts, these matters should be decided by the United States Supreme Court. This is especially true because the decision of the Ninth Circuit is in conflict with an entire body of Bankruptcy Law interpreting §70a(5).**

Bankruptcy Act §70a(5)

> "is obviously the most comprehensive of all the clauses in §70a dealing with title to the bankrupt's property. It is probably sufficiently broad to include all, or nearly all, the classes of property enumerated in the other clauses of the subdivisions."
>
> Volume 4A *Collier on Bankruptcy*, at p. 136, Fourteenth Ed., 1969.

Thus, §70a(5) is a major vehicle by which trustees in bankruptcy obtain property with which to pay off the claims of creditors of bankrupts and thereby to carry out one of the major policies of the Bankruptcy Act. For this reason:

> "§70a(5) is extremely broad and searching, and has been drawn 'to comprise all property that the bankrupt may have that may be of use or benefit to him, however small.'"
>
> *Collier, Ibid.*

Indeed, property of every conceivable variety has been awarded to trustees in bankruptcy under §70a (5). See *Collier, supra*, §70.15 to §70.35.

Courts construing §70a(5) have often been faced with property similar in nature to the vacation pay involved in this case, in that it was compensation earned and accrued for services performed before the

date of bankruptcy, but payable after said date. So long as the bankrupt had earned the absolute right to receive the compensation prior to the date of bankruptcy, it passed to his trustee in bankruptcy. Thus, several cases have held that vacation pay earned prior to the date of bankruptcy passes to the trustee in bankruptcy. See e.g., *Kolb v. Berlin, supra; In re Cohen,* 276 F.Supp. 889 (D.C., N.D. Cal., 1967); *In re Keuther,* 205 F.Supp. 223 (D.C., N.D. Cal., 1962).

The Ninth Circuit relies on the case of *Tennessee Valley Authority v. Kinzer,* 142 F.2d 883 (6th Cir. 1944) as authority for its holding that vacation pay does not pass to a trustee in bankruptcy. However, the Court apparently overlooked the fact that the holding in said case was based on a peculiarity in the law of public corporations, such as T.V.A. which, unlike the case before this Court, provided that:

> "With regard to the vacation pay, this was not due the bankrupt at the time of adjudication. In order to receive it, he would have to remain in the employ of the Authority, although he would be on vacation. The pay accrued during such period. Leave with pay is provided by statute; it applies to employees of corporations created under authority of an act of Congress, and is administered under regulations prescribed by the President. Title 5 U.S.C.A. §§30, 30b-30k. Leave of absence with pay is synonymous with a work or duty status; there is no pay for annual leave unless the leave is actually taken. Annual leave is earned for all days an employee is in a pay status, regardless of whether he be on actual duty or on leave of absence with pay, and he accrues annual leave while on 'terminal leave'—

> that is, on annual leave taken immediately prior to final separation from the service; leave may not be extended beyond the final termination of service, or duty status, of an employee; nor is any payment for annual leave authorized, after the employee's separation from service, for leave accrued, but not taken, prior to such separation. 17 Comp. Gen. 377, 641, 643 (1938); 21 Comp. Gen. 596, 597 (1941).
>
> *Kinzer, supra,* at 838.

The Ninth Circuit further overlooks the later case of *Hill v. Schaefer,* 221 F.2d 914 (5th Cir., 1955) which superseded *Kinzer* by holding that, under the present statutes regulating T.V.A., accrued annual leave of an employee of T.V.A. passed to his trustee in bankruptcy. The Court explained the effect of the new statute at 221 F.2d 915:

> "We think the difference in the legal position of the employee in the Kinzer case from that of Hill as to what constitutes separation from the service, compels us to arrive at the opposite conclusion as to the funds here in controversy. The circumstance giving rise to this different result is the enactment by the Congress, beginning in 1944, of a series of laws that permit a Federal employee to take a lump sum payment for accumulated or accrued annual leave upon his separation from the service, thus making it unnecessary for his actual separation to be postponed to the last day of his accrued annual leave. In the Kinzer case the employee tendered his resignation on July 15, 1941, such resignation to be effective as of August 28th. Between these dates he was on annual leave of absence with pay. This is the only way in which he could be paid for the

leave period. On August 7th he was adjudicated a bankrupt. In the present case Hill tendered his resignation on December 20th to become effective on January 2, 1954. On January 2nd he had accrued annual leave of 32 days. This was his last day of service. Under the statute as it stood in 1954, it was not necessary for Hill to remain in the employ of the Tennessee Valley Authority until the termination of this 32 day period, since Title 5, U.S.C.A. §61b provides for the lump sum payment for accumulated or accrued annual leave upon separation from the service.[2]

The fact that the court held to be present in the Kinzer case—that is that Kinzer was not separated from the service until the expiration of his leave period—, is, therefore, not present here. The trial court, therefore, was correct in determining that when Hill exercised his discretion to ask for a lump sum payment of his contribution to the retirement fund, as provided in 5 U.S.C.A. §733(a) which he did on January 4th, 4 days before bankruptcy, he had 'become separated from the service,' and, under the terms of the statute, he 'shall be paid * * * (B) the total amount credited to his individual account together with interest * * *.'

It is clear, therefore, that prior to the filing of his bankruptcy petition, Hill had a clear legal claim on the Tennessee Valley Authority for the amount of his payments into the retirement fund. This amount was, therefore, an asset in his hands which passed to his trustee in bankruptcy."

Clearly, the situation in the present case is more akin to that in *Hill* than it is to that in *Kinzer,* since

the bankrupts herein had earned the absolute right to receive their vacation pay at either of two times: (1) when they took a vacation, or (2) when their employment terminated. Thus, the Ninth Circuit's reliance upon *Kinzer* is misplaced. Further, it is questionable if *Kinzer* has any precedental value whatsoever at present, since it, practically, has been superseded by *Hill*.

*Collier, supra,* §370.34 at pp. 447-8 concerns property of a similar nature to that in the present case. It states:

> "A trustee in bankruptcy takes title to all wages, fees and commissions earned and accrued prior to bankruptcy, or that relate to services already performed, even though they may be paid subsequent thereto.[4] He succeeds to the right to collect such sums as are due if not paid."

Footnote 4, in *Collier, supra,* cites examples of the many kinds of compensation for services performed before the date of bankruptcy, which pass to bankrupts' trustees in bankruptcy, which are no different, in nature, from that involved in the case at bar.

As is more fully covered in the preceding section of this petition, *Segal v. Rochelle, supra,* followed the distinction made in prior cases when it held that the loss carry-back tax refund passed to a trustee in bankruptcy. No case, other than the present one, has been found in which a Court has cited *Segal* as support for a decision that compensation earned before the date of bankruptcy did not pass to the trustee in bankruptcy, because such pre-bankruptcy compensa-

tion was necessary for a "fresh start." To the contrary, the cases of *In re Durham,* 272 F.Supp. 205 (D.C., S.D. Ill., 1967), and *In re Wiles,* 205 F.Supp. 13 (D.C., W.D. Va., 1968), both quote extensively from *Segal,* to support their holdings that separation pay of a bankrupt, earned for services performed before the date of bankruptcy, passes to the trustee in bankruptcy under Bankruptcy Act, §70a. The classic rule is succinctly stated in *Durham* at p. 208:

> "The theory of the Bankruptcy Act quite clearly is that the bankrupt should have the ownership of all future earnings, unfettered from the claims of creditors. However, moneys earned prior to bankruptcy should go to the Trustee for the benefit of the bankrupt's creditors."

*Local Loan v. Hunt,* 292 U.S. 234, 5 S.Ct. at 695 (1933), also relied on by the Ninth Circuit, did not involve the question of whether property passed to a trustee in bankruptcy under §70a(5). It involved the question of whether a discharged bankrupt could enjoin a creditor, whose debt had been scheduled, from attempting to enforce a pre-bankruptcy assignment of future wages. Such a case is no precedent for the Ninth Circuit's decision, since the Court in *Hunt* was not faced with the policy behind §70a(5), which is that the trustee should collect all property of the bankrupt, so it can be distributed to his creditors.

Thus, it can be seen that, prior to the Ninth Circuit's decision in the present case, the test of what property of the bankrupt passed to his trustee in bankruptcy was quite clear, and easy to administer in

a way which assured that the pre-bankruptcy creditors of the bankrupt received the maximum amount possible, while at the same time assuring that the bankrupt was free, after the date of bankruptcy, to accumulate new wealth. Indeed, this was obviously Congress's purpose in enacting the Bankruptcy Act. It is as if a line were drawn through the bankrupt's life on the date of bankruptcy. All property earned or realized, which is transferable by him or leviable under state law, as of that date, is given to his creditors. In return, the bankrupt is discharged from his dischargeable debts to those creditors. On the other hand, all property earned or realized by the bankrupt's efforts after the date of bankruptcy, is his to keep. Because the line in time drawn by §70a(5) is an arbitrary one, there are bound to be instances where the bankrupt has earned some compensation or realized something of value before the date of bankruptcy, but has not yet received it. The Courts have uniformly held that such property passes to the trustee in bankruptcy. Their view is supported by the leading commentary on bankruptcy law, (see *Collier on Bankruptcy, supra.*) Such test is clear, easy to administer and is intimately connected to the purpose and scheme of the Bankruptcy Act.

This universally accepted test is abandoned by the Ninth Circuit in the present case and the whole body of prior law is disregarded.

In addition to the fact that the decision of the Ninth Circuit overturns the traditional means by

which Bankruptcy Courts determine whether or not vacation pay and other assets pass to trustees in bankruptcy, the Ninth Circuit's decision causes grave difficulties in the administration of estates of bankrupts, because, the Ninth Circuit does not set forth a clear standard which can be utilized by trustees in bankruptcy and Bankruptcy Courts to determine whether or not various assets pass to the trustee. To be sure the Ninth Circuit purports to state a test:

> "Under section 70a (5) of the Bankruptcy Act (11 U.S.C. §110a(5)[1] vacation pay is 'property,' title to which vests in the trustee only if it is (1) nonexempt, (2) transferable or lienable, and (3) 'so little entangled with the bankrupt's ability to make an unencumbered fresh start' that it should be so regarded."
>
> Appendix "B", pp. xix-xx.

But, it does not clarify what is meant by the words "so little entangled with the bankrupt's ability to make an unencumbered fresh start." Although the Ninth Circuit cites this Court's decisions in *Segal v. Rochelle, supra,* and *Local Loan v. Hunt, supra,* as support for its test, these cases do not serve to define the quoted words, as used by the Ninth Circuit. As was fully discussed in the prior section of this petition, the quoted words, as used in *Segal,* mean property earned or realized before the date of bankruptcy, while in *Hunt,* this Court was not concerned at all with interpreting §70a(5).

One possible meaning of the quoted words, as used by the Ninth Circuit, is that compensation, and, by

inference, other property, does not pass to the trustee in bankruptcy, under §70a(5), unless it is actually received by the bankrupt before the date of bankruptcy. The Ninth Circuit, by analogizing vacation pay to future wages, seems to imply that this is what it meant by the quoted words. However, it is not likely that this is what is meant, because such a contention was specifically rejected in *Segal*, the case most heavily relied on by the Ninth Circuit. Further, such a holding is contrary to all previous law. Moreover, under California law, the law of the state in which these cases arose, wages are deemed received when earned and accrued, even if not yet paid over to the wage earner, *Medical Assn. v. Rambo,* 33 Cal. App. Supp. 2d 756 (1938).

Another possible interpretation of the quoted words is that a bankrupt does not have to turn over vacation pay, or other property, to his trustee in bankruptcy, if he can show that he will be, in any way, inconvenienced by having to do so. This appears to be the meaning of the following language of the Ninth Circuit's Opinion at Appendix "B", p. xxii.

> "But the overriding reason for our view is that an employee who will be without wages or on reduced wages during future layoffs or who will be *without a vacation* cannot be said to have been given the fresh start Congress intended him to have." (Emphasis added).

If that is the basic test of the Ninth Circuit, such a test suffers from severe defects. The primary means

by which the Bankruptcy Act fulfills the policy of giving a debtor a fresh start is by the bankrupt obtaining a discharge from his dischargeable debts. One of the obvious consequences of filing bankruptcy is that all of the non-exempt assets of the bankrupt pass to his trustee for the benefit of the bankrupt's creditors as provided in §70a of the Bankruptcy Act. The Ninth Circuit's decision seems to hold that this fresh start would be denied if vacation pay passes to the trustee in bankruptcy, even though the vacation pay is *already accrued and already earned* at the time of bankruptcy.

To give vacation pay to the trustee in bankruptcy would obviously not affect the bankrupt's ability to acquire earnings for services rendered after bankruptcy, because no claim is made here by the trustee for any money to be earned by the bankrupt in the future after bankruptcy. Therefore, it is not true that the turnover of the accrued and earned vacation pay will deprive the bankrupt of the opportunity for a "fresh start" by depriving him of future earnings, for the simple reason that the vacation pay in question had already been earned at the time of the bankruptcy, and is not part of any future earnings of the bankrupt after bankruptcy.

It would be inequitable to allow the bankrupt to deprive his creditors, from whose debts he receives a discharge, of an asset which had been accrued and earned at the time of bankruptcy. The "fresh start" policy should not be applied so as to subvert another basic purpose of the Bankruptcy Act which is to ob-

tain for the creditors all of the assets of the bankrupt at the time of bankruptcy. See *Segal, supra.*

The only hardship suffered by the bankrupts is that they must take a vacation without pay, or forego a vacation, if they wish to continue to be paid for the period covered by the accrued vacation pay. Such consequence of the trustee's right to the assets of the bankrupt, at the time of bankruptcy, does not justify depriving the trustee of this right, nor should it be termed an undue hardship. It is a hardship for a bankrupt to give up his other assets at the time of bankruptcy, but this is the price that must be paid if a bankrupt wishes to avail himself of the relief provided in the Bankruptcy Act. Bankrupts should not be able to take advantage of the discharge provisions of the Bankruptcy Act and then be allowed to be free of the other provisions thereof, such as §70a.

The Ninth Circuit's decision, by interpreting "fresh start" as it does, allows a bankrupt to defeat the trustee in bankruptcy's claim to any item of property if the bankrupt can show that it would be a hardship to him, or would inconvenience him if the property passed to the trustee. Under this standard, a debtor could file bankruptcy, be discharged of his debts, and retain all of his property because it is almost always a hardship for a debtor to be deprived of anything of value. Creditors, on the other hand, would receive nothing. It would be impossible to administer the Bankruptcy Act under such conditions, because of the flood of bankrupts seeking to take advantage of the new doctrine enunciated by the Ninth Circuit.

Such a state of affairs as has been described might seem far-fetched, but the Ninth Circuit's opinion allows for the interpretation that property of a bankrupt does not pass to the trustee in bankruptcy, if such passing works a hardship or inconvenience on the bankrupt. Further, it must again be emphasized that to be deprived of a vacation is not a severe hardship. It is certainly not as severe as being deprived of a home, and the bankrupt's home will, in fact, pass to his trustee in bankruptcy under §70a(5) unless it is exempted by state law. (See *Collier, supra,* §70.15 to 70.17).

It should also be noted that the Bankruptcy Act does protect property of the bankrupt which is deemed necessary to the bankrupt, so that he can earn a living and maintain himself and his family.

Bankruptcy Act, Section 6 (11 U.S.C. 324) states:

> "§6. Exemptions of Bankrupts. This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States or by the State laws in force at the time of the filing of the petition, . . ."

In the State of California, California Code of Civil Procedure §§690 to 690.26 list a wide variety of items of property which are exempt from the claims of creditors and also of the trustee in bankruptcy.

Bankrupts are thus protected by §70, which provides, in effect, that property of a bankrupt does not pass to his trustee if it is property "which is held to be exempt".

Thus, the rights of the bankrupt are amply protected.

In reaching its present decision, the Ninth Circuit declined to decide whether vacation pay was transferable under State law. The decision, thus, presents a curious anomaly in that creditors under state law might be able to reach vacation pay, even though a trustee in bankruptcy cannot. Clearly, Congress did not intend such a result.

For the above mentioned reasons, and particularly in view of the fact that the Ninth Circuit's decision might pave the way for confusion and disruption of the whole bankruptcy system, this Court should grant petitioner a writ of certiorari, and decide the important questions of interpretation of the Bankruptcy Act, clearly raised by this case.

Finally, the questions raised by the Ninth Circuit's opinion are of a recurring nature. As was most aptly stated by respondent Harris in his Brief in Support of Petition for Allowance of Appeal (not included in record).

> "B. *The result reached by the Referee and affirmed by the District Court will affect thousands of bankrupts over the ensuing months and years.*
>
> 9,103 bankruptcy petitions were filed in the Northern District of California in the fiscal year 1967. Of this total, about 92% or 8,375 can be assumed to be non-business petitions . . .[2] In each of these approximately 8,375 proceedings per year, the vacation accrual asset is potentially present. One can only guess, however, at the number of proceedings in which trustees will seek

turnover orders for such sums, but the number will obviously be substantial.

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*Source: Tables of Bankruptcy Statistics for the year ending June 23, 1967; Administrative Office of the U.S. Courts May 31, 1968, Pg. 5 and Table F1."

The Ninth Circuit's test as to what property passes to the trustee in bankruptcy potentially affects every case arising under the Bankruptcy Act, and the questions raised thereby are of crucial importance in the administration of estates in bankruptcy.

---

## CONCLUSION

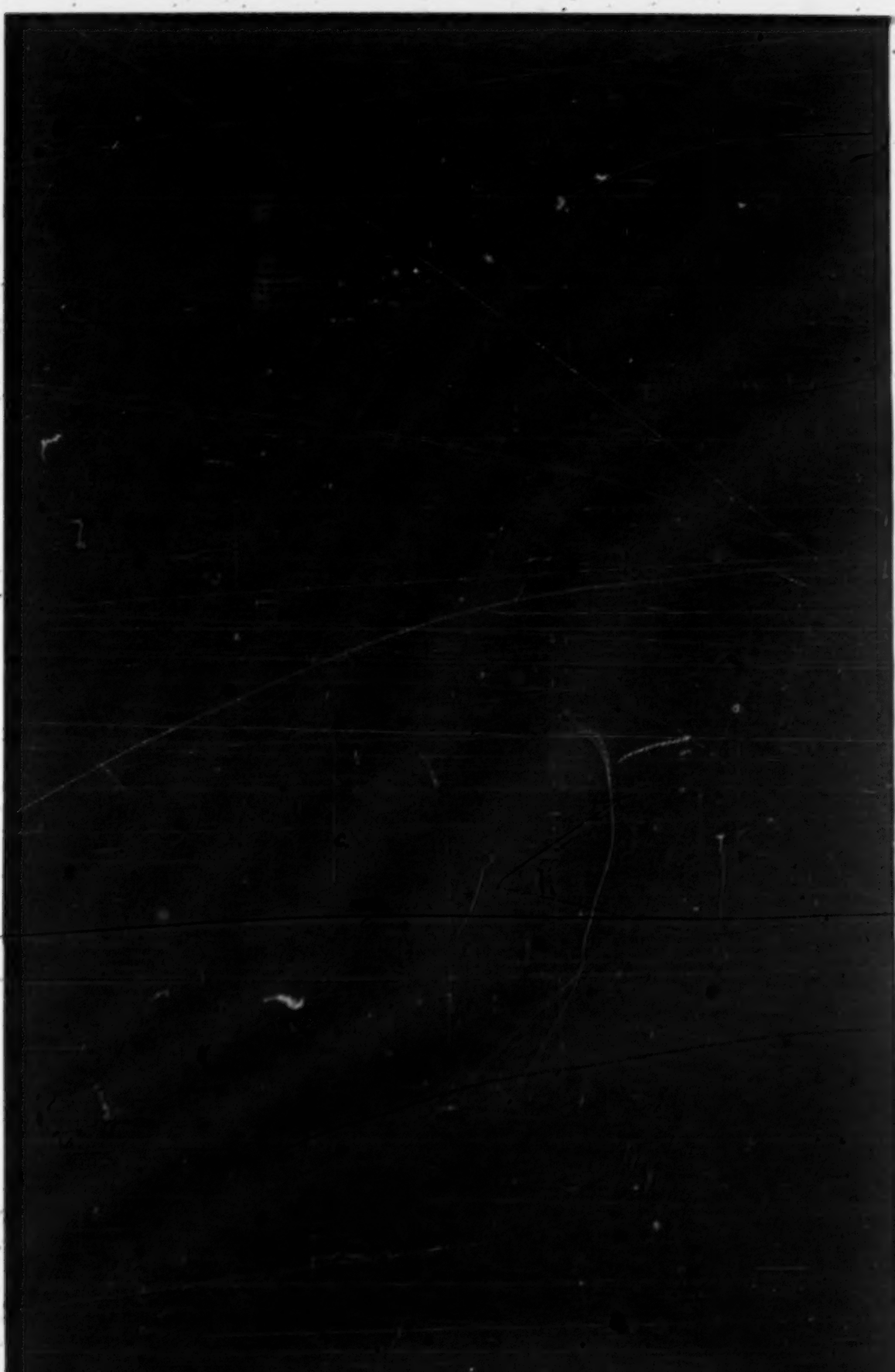
For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
July 20, 1970.

Respectfully submitted,
LAWRENCE GOLDBERG,
*Counsel for Petitioner, Kal W. Lines, Trustee in Bankruptcy of the Estates of Kenneth Robert Frederick, Bankrupt, and Clarence Harris, Bankrupt.*

GLICKSBERG, KUSHNER & GOLDBERG,
BURTON I. MEYER,
*Of Counsel.*

**(Appendices Follow)**



## Appendix A

In the United States District Court
for the Northern District of California

No. 104,138 In Bankruptcy

In the Matter of
Kenneth Robert Frederick,
Bankrupt.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER ADJUDGING THAT CERTAIN ACCRUED WAGES AND VACATION PAY OF THE BANKRUPT PASSED TO THE TRUSTEE, AND TURNOVER ORDER

Kal W. Lines, trustee of the above-named bankrupt, having filed herein, on November 16, 1967, his application for a turnover order against the bankrupt with respect to certain unpaid wages and vacation pay due to the bankrupt as of the date of bankruptcy; and this Court having issued its order to show cause on said application on November 16, 1967; and said matter having come on regularly for hearing before this Court on December 6, 1967, the said trustee appearing for himself as trustee and the bankrupt being personally present and represented by his attorney, Michael H. Weiss, Esq., and the parties having introduced certain evidence; and the Court having duly

considered the evidence and the law; and the matter having been submitted, now makes the following:

## FINDINGS OF FACT

1. That the bankrupt filed his petition in bankruptcy on September 15, 1967, in the above-entitled Court, and on said date was duly adjudged a bankrupt.

2. That Kal W. Lines was duly appointed the trustee of the estate of the bankrupt, and thereafter duly qualified, and now remains the duly appointed, qualified and acting trustee of said estate.

3. That as of the date of bankruptcy on September 15, 1967, the bankrupt was employed by Litton Industries in San Carlos, California, and that as of said date the bankrupt had accrued and earned wages due to him in the sum of $137.28, all of which sum represented wages earned within 30 days next preceding the filing of the bankruptcy petition herein; and that as of the date of bankruptcy the bankrupt owed debts incurred by him for the common necessaries of life within the meaning of the provisions of §690.11 of the California Code of Civil Procedure.

4. That as of the date of bankruptcy on September 15, 1967, the bankrupt had accrued and earned vacation pay to his credit in the sum of $137.28, of which sum $31.20 represented vacation pay accrued and earned within 30 days next preceding the filing of the bankruptcy petition herein;

That had the bankrupt terminated his employment as of the date of bankruptcy he would have been en-

titled to receive, and would have received, the full amount of said accrued and earned vacation pay which had been accrued and earned as of the date of bankruptcy, to-wit: the sum of $137.28.

That had the bankrupt not terminated his employment as of the date of bankruptcy or any other time, but had instead remained in the employ of Litton Industries, the bankrupt would have received his accrued and earned vacation pay at the time when Litton Industries normally closes down its plant, and at which time all employees of Litton Industries take their vacation, and at which time said employees receive their accrued and earned vacation pay with respect to said vacation period. In late December, 1967, and early January, 1968, Litton Industries closed down its plant for the vacation period, at which time all of the employees of Litton Industries, including the bankrupt, took their vacation. At that time, the bankrupt received his vacation pay which included the said sum of $137.28, which sum the bankrupt had accrued and earned as of the date of bankruptcy on September 15, 1967.

From the foregoing Findings of Fact, the Court makes the following:

## CONCLUSIONS OF LAW

1. That title to the bankrupt's unexempt wages in the sum of $68.64, representing one-half of the bankrupt's wages earned within 30 days next preceding the filing of the bankruptcy petition herein on September 15, 1967, and due to the bankrupt, vested in Kal W.

Lines, trustee in bankruptcy of the estate of the above-named bankrupt, as of the date of bankruptcy, under the provisions of §70a(5) of the Bankruptcy Act.

2. That title to the bankrupt's unexempt vacation pay in the sum of $121.68, representing the vacation pay that the bankrupt had accrued and earned as of the date of bankruptcy, to-wit: $137.28 *less* one-half of the said vacation pay which the bankrupt had accrued and earned within 30 days next preceding the filing of the bankruptcy petition, to-wit: the sum of $15.60, vested in Kal W. Lines, trustee in bankruptcy of the estate of the above-named bankrupt, as of the date of bankruptcy, under the provisions of §70a(5) of the Bankruptcy Act.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

1. That the sum of $68.64 representing the bankrupt's unexempt wages due to the bankrupt on September 15, 1967, the date of bankruptcy herein, vested in Kal W. Lines, trustee in bankruptcy of the above-named bankrupt as of the date of bankruptcy;

2. That the sum of $121.68 representing the bankrupt's unexempt vacation pay which the bankrupt had earned and accrued as of September 15, 1967, the date of bankruptcy herein, vested in Kal W. Lines, trustee in bankruptcy of the above-named bankrupt as of the date of bankruptcy;

3. That the bankrupt be and he hereby is ordered to turn over to the trustee, forthwith, the said sum of

$68.64 representing the bankrupt's unexempt wages due to the bankrupt as of September 15, 1967; and

4. That the bankrupt be and he hereby is ordered to turn over to the trustee, forthwith, the said sum of $121.68, representing the bankrupt's unexempt vacation pay which the bankrupt had accrued and earned as of September 15, 1967, the date of bankruptcy herein.

Dated: January 31, 1968.

Lynn J. Gillard
Referee in Bankruptcy

Filed January 31, 1968,
Lynn J. Gillard,
Referee in Bankruptcy.

In the United States District Court
For the Northern District of California

No. 103,804
In Bankruptcy

In the Matter of
Clarence (NMN) Harris,
Bankrupt.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER ADJUDGING THAT CERTAIN ACCRUED WAGES AND VACATION PAY OF THE BANKRUPT PASSED TO THE TRUSTEE, AND TURNOVER ORDER.

Kal W. Lines, trustee of the above-named bankrupt, having filed herein, on November 3, 1967, his application for a turnover order against the bankrupt with respect to certain unpaid wages and vacation pay due to the bankrupt as of the date of bankruptcy; and this Court having issued its order to show cause on said application on November 3, 1967; and said matter having come on regularly for hearing before this Court on December 4, 1967, the said trustee appearing for himself as trustee and the bankrupt being personally present and represented by his attorney, John T. Hansen, Esq., and the parties having introduced certain evidence; and the Court having

duly considered the evidence and the law; and the matter having been submitted, now makes the following:

## FINDINGS OF FACT

1. That the bankrupt filed his petition in bankruptcy on August 31, 1967, in the above-entitled Court, and on said date was duly adjudged a bankrupt.

2. That Kal W. Lines was duly appointed the trustee of the estate of the bankrupt, and thereafter duly qualified, and now remains the duly appointed, qualified and acting trustee of said estate.

3. That as of the date of bankruptcy on August 31, 1967, the bankrupt was employed by Pacific Gas & Electric Company, San Francisco, California, and that as of said date the bankrupt had accrued and earned wages due to him in the sum of $102.04, all of which sum represented wages earned within 30 days next preceding the filing of the bankruptcy petition herein; and that as of the date of bankruptcy the bankrupt owed debts incurred by him for the common necessaries of life within the meaning of the provisions of §690.11 of the California Code of Civil Procedure.

4. That as of the date of bankruptcy on August 31, 1967, the bankrupt had accrued and had been credited with vacation time, the monetary equivalent of which was the sum of $144.14, of which $20.59 represented accruals credited within 30 days next preceding the filing of the bankruptcy petition herein;

That had the bankrupt terminated his employment as of the date of bankruptcy he would have been en-

titled to receive, and would have received, a cash payment representing said vacation accruals, to wit: the sum of $144.14;

That the bankrupt has not terminated his employment with Pacific Gas & Electric Company;

That the bankrupt would be entitled to receive said accrued vacation pay under only two conditions: (1) he terminate his employment, or (2) that at some date after January 1, 1968, he actually take vacation time, in which instance he would receive said accrued vacation pay as his compensation during said vacation period.

From the foregoing Findings of Fact, the Court makes the following:

## CONCLUSIONS OF LAW

1. That title to the bankrupt's unexempt wages in the sum of $51.02, representing one-half of the bankrupt's wages earned within 30 days next preceding the filing of the bankruptcy petition herein on August 31, 1967, and due to the bankrupt, vested in Kal W. Lines, trustee in bankruptcy of the estate of the above-named bankrupt, as of the date of bankruptcy, under the provisions of §70a(5) of the Bankruptcy Act.

2. That title to the bankrupt's unexempt vacation pay in the sum of $133.85, representing the vacation pay that the bankrupt had accrued and earned as of the date of bankruptcy, to-wit: $144.14 *less* one-half of the said vacation pay which the bankrupt had

accrued and earned within 30 days next preceding the filing of the bankruptcy petition, to-wit: the sum of $10.29, vested in Kal W. Lines, trustee in bankruptcy of the estate of the above-named bankrupt, as of the date of bankruptcy, under the provisions of §70a(5) of the Bankruptcy Act.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

1. That the sum of $51.02 representing the bankrupt's unexempt wages due to the bankrupt on August 31, 1967, the date of bankruptcy herein, vested in Kal W. Lines, trustee in bankruptcy of the above-named bankrupt as of the date of bankruptcy;

2. That the sum of $133.85 representing the bankrupt's unexempt vacation pay which bankrupt had earned and accrued as of August 31, 1967, the date of bankruptcy herein, vested in Kal W. Lines, trustee in bankruptcy of the above-named bankrupt as of the date of bankruptcy; and

3. That the bankrupt be, and he hereby is ordered to turn over to the trustee, forthwith, the said sum of $51.02 representing the bankrupt's unexempt wages due to the bankrupt as of August 31, 1967, the date of bankruptcy herein; and

4. That the bankrupt be, and he hereby is ordered to turn over to the trustee the said sum of $133.85, representing the bankrupt's unexempt vacation pay which the bankrupt had accrued and earned as of August 31, 1967, the date of bankruptcy herein, upon receipt thereof by the bankrupt from his employer,

as the result of the bankrupt taking his vacation, or upon termination of the bankrupt's employment, or otherwise.

Dated: January 31, 1968.

Lynn J. Gillard
Referee in Bankruptcy

Filed January 31, 1968.
Lynn J. Gillard,
Referee in Bankruptcy.

In the United States District Court
For the Northern District of California

No. 103,804
In Bankruptcy

In the Matter of
Clarence (NMN) Harris,
Bankrupt.

## ORDER AFFIRMING REFEREE'S ORDER AND DENYING PETITION FOR REVIEW

The bankrupt herein has filed a petition for review seeking a reversal of the order of the Referee directing the bankrupt to turn over to the trustee certain earnings and accrued vacation pay.

The facts of the case are not in dispute and are set out in the Stipulation as to Facts filed herein. Said facts are as follows:

1. That the bankrupt filed his petition in bankruptcy on August 31, 1967, in the above-entitled Court, and on said date was duly adjudged a bankrupt.

2. That as of the date of bankruptcy on August 31, 1967, the bankrupt was employed by Pacific Gas & Electric Company, San Francisco, California, and that as of said date the bankrupt had accrued and earned wages due to him in the sum of $102.04, all of which sum represented wages earned within 30 days

next preceding the filing of the bankruptcy petition herein; and that as of the date of bankruptcy the bankrupt owed debts incurred by him for the common necessaries of life within the meaning of the provisions of §690.11 of the California Code of Civil Procedure.

3. That as of the date of bankruptcy on August 31, 1967, the bankrupt had accrued and had been credited with vacation time, the monetary equivalent of which was the sum of $144.14, of which $20.59 represented accruals credited within 30 days next preceding the filing of the bankruptcy petition herein;

That had the bankrupt terminated his employment as of the date of bankruptcy he would have been entitled to receive, and would have received, a cash payment representing said vacation accruals, to wit: the sum of $144.14;

That the bankrupt has not terminated his employment with Pacific Gas & Electric Company;

That the bankrupt would be entitled to receive said accrued vacation pay under only two conditions: (1) he terminate his employment, or (2) that at some date after January 1, 1968, he actually take vacation time, in which instance he would receive said accrued vacation pay as his compensation during said vacation period.

The Referee has ordered the turnover of the following amount:

$133.85 representing said vacation pay accrued and carned as of the date of bankruptcy after allowing a

deduction of $10.29 which is one-half of that amount of said vacation pay accrued and earned within 30 days prior to bankruptcy which is the amount exempted under California Code of Civil Procedure §690.11.

The bankrupt objects to the turnover of his accrued vacation pay contending that the trustee is not entitled thereto under Section 70a(5) of the Bankruptcy Act. This Court has already ruled in favor of the trustee on this question in *In re Keuther*, 203 F. Supp. 223 (N.D. Calif. 1962) and *In re Cohen*, 276 F. Supp. 889 (N.D. Calif. 1967) which decisions are further supported by *Kolb v. Berlin*, 356 F.2d 269 (5th Cir. 1966). The vacation pay in question did not constitute future wages as contended by the bankrupt since it had been earned as of the date of bankruptcy for services rendered prior thereto. Said accrued vacation pay passed to the trustee as of the date of bankruptcy pursuant to Section 70a(5) of the Bankruptcy Act.

Therefore, the order of the Referee is affirmed and the petition for review denied.

Dated: June 3, 1968.

William T. Sweigert
Judge of the United States
District Court.

Filed June 4, 1968,
James P. Welsh, Clerk.

In the United States District Court
For the Northern District of California

No. 104,138
In Bankruptcy

In the Matter of
Kenneth Robert Frederick,
Bankrupt.

## ORDER AFFIRMING REFEREE'S ORDER AND DENYING PETITION FOR REVIEW

The bankrupt herein has filed a petition for review seeking a reversal of the order of the Referee directing the bankrupt to turn over to the trustee certain earnings and accrued vacation pay.

The facts of the case are not in dispute and are set out in the Stipulation as to Facts filed herein. Said facts are as follows:

1. That the bankrupt filed his petition in bankruptcy on September 15, 1967, in the above entitled Court, and on said date was duly adjudged a bankrupt.

2. That as of the date of bankruptcy on September 15, 1967, the bankrupt was employed by Litton Industries in San Carlos, California, and that as of said date the bankrupt had accrued and earned wages due to him in the sum of $137.28, all of which sum represented wages earned within 30 days next preceding

the filing of the bankruptcy petition herein; and that as of the date of bankruptcy the bankrupt owed debts incurred by him for the common necessaries of life within the meaning of the provisions of §690.11 of the California Code of Civil Procedure.

3. That as of the date of bankruptcy on September 15, 1967, the bankrupt had accrued and earned vacation pay to his credit in the sum of $137.28, of which sum $31.20 represented vacation pay accrued and earned within 30 days next preceding the filing of the bankruptcy petition herein:

That had the bankrupt terminated his employment as of the date of bankruptcy he would have been entitled to receive, and would have received, the full amount of said accrued and earned vacation pay which had been accrued and earned as of the date of bankruptcy, to wit: the sum of $137.28.

That had the bankrupt not terminated his employment as of the date of bankruptcy or any other time, but had instead remained in the employ of Litton Industries, the bankrupt would have received his accrued and earned vacation pay at the time when Litton Industries normally closes down its plant, and at which time all employees of Litton Industries take their vacation, and at which time said employees received their accrued and earned vacation pay with respect to said vacation period. In late December, 1967, and early January, 1968, Litton Industries closed down its plant for the vacation period, at which time all of the employees of Litton Industries, including the bankrupt, took their vacation. At that time, the bankrupt received his vacation pay which included

the said sum of $137.28, which sum the bankrupt had accrued and earned as of the date of bankruptcy on September 15, 1967.

The Referee has ordered the turnover of the following amounts:

(1) $68.64 representing said wages accrued and earned, as of the date of bankruptcy after allowing a deduction of $68.64 which is one-half of that amount of said wages accrued and earned within 30 days prior to bankruptcy which is the amount exempted under California Code of Civil Procedure §690.11; (2) $121.68 representing said vacation pay accrued and earned as of the date of bankruptcy after allowing a deduction of $15.60 which is one-half of that amount of said vacation pay accrued and earned within 30 days prior to bankruptcy which is the amount exempted under California Code of Civil Procedure §690.11.

The bankrupt objects to the amount of the wage exemption allowed by the Referee contending that the exemption under §690.11 should apply to the wages of the bankrupt after certain deductions rather than to his gross earnings. This issue is not properly raised here for the reasons stated in the Referee's Certificate on Petition for Review: (1) the Answer filed to the trustee's application for a turnover order admits the amount of unexempt wages to be $68.64. (2) no claim of exemption under California Code of Ciivl Procedure §690.11 was claimed by the bankrupt in Schedule B(5) of his petition, and (3) no evidence was introduced establishing that any lesser sum was due to the

trustee. Even if such issue was properly before the Court, it is clear from the language and meaning of California Code of Civil Procedure §690.11 that the exemption provided thereby applies to gross earnings and does not contemplate that a debtor be allowed the benefit of deductions from his earnings so as to diminish the amount of a debtor's wages reachable by his creditors.

The bankrupt objects to the turnover of his accrued vacation pay contending that the trustee is not entitled thereto under Section 70a(5) of the Bankruptcy Act. This Court has already ruled in favor of the trustee on this question in *In re Keuther,* 203 F. Supp. 223 (N.D. Calif. 1962) and *In re Cohen,* 276 F. Supp. 889 (N.D. Calif. 1967) which decisions are further supported by *Kolb v. Berlin,* 356 F.2d 269 (5th Cir. 1966). The vacation pay in question did not constitute future wages as contended by the bankrupt since it had been earned as of the date of bankruptcy for services rendered prior thereto. Said accrued vacation pay passed to the trustee as of the date of bankruptcy pursuant to Section 70a(5) of the Bankruptcy Act.

Therefore, the order of the Referee is affirmed and the Petition for Review is denied.

Dated: June 3, 1968.

William T. Sweigert
Judge of the United States
District Court.

Filed June 4, 1968.
James P. Welsh, Clerk.

## Appendix B

United States Court of Appeals
For the Ninth Circuit

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|---|---|
| Kenneth Robert Frederick, Appellant, vs. Kal W. Lines, Appellee, | No. 23,015 |
| Clarence Harris, Appellant, vs. Kal W. Lines, Appellee, | No. 23,016 |

[April 21, 1970]

Appeal from the United States District Court
for the Northern District of California

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Before: Hamley, Browning, and Hufstedler,
Circuit Judges

Hufstedler, Circuit Judge:

Does title to a bankrupt wage earner's accrued and unpaid vacation pay pass to the trustee in bankruptcy under section 70a(5) of the Bankruptcy Act? We hold that it does not, disapproving the contrary views expressed in *In re Cohen* (N.D. Cal. 1967) 276 F. Supp. 889 and *In re Keuther* (N.D. Cal. 1962) 205 F. Supp. 223.

The respective trustees of the bankrupt estates of appellants Frederick and Harris secured turnover orders from the referee directing that each of them pay over his vacation pay to the trustee at such future time as each received that pay. The district court affirmed the orders, and these appeals followed.

The facts in both cases were stipulated. The two bankrupts are California residents; each filed a voluntary bankruptcy petition; and each derives his support from wages. The differences between the two cases lie in the manner in which their respective employers handle vacations. Mr. Frederick's employer, a large manufacturer, closes its plant for a week twice each year, once during the summer and again at year's end. All employees are given a "vacation" with full pay during the plant closings. Employees cannot draw vacation pay until the plant closes unless the employee is earlier terminated. As of the date he filed his bankruptcy petition, Mr. Frederick's account showed vacation pay credited to him in the sum of $121.68. Mr. Harris' employer, a public utility, does not give its employees compulsory layoffs, but the more conventional voluntary vacation plan. At the time Mr. Harris filed his petition, his account showed accrued vacation pay of $144.14, no part of which he could draw until he took a vacation or was earlier terminated.

Under section 70a(5) of the Bankruptcy Act (11 U.S.C. § 110a(5),[1] vacation pay is "property," title to

[1]That section provides:

(a) The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with

which vests in the trustee only if it is (1) nonexempt, (2) transferable or lienable, and (3) "so little entangled with the bankrupt's ability to make an unencumbered fresh start" that is should be so regarded. (*Segal v. Rochelle* (1966) 382 U.S. 375, 380; *Local Loan v. Hunt* (1934) 292 U.S. 234.)

It is unnecessary for us to decide whether, under California law, either Mr. Frederick or Mr. Harris could have transferred his right to receive his vacation pay, or whether creditors could have reached those expectancies, because, even if they could, we think that a transfer of those rights to the trustee impairs the bankrupt's abilities to make an unencumbered fresh start. An asset is not deemed "property" for the purpose of applying section 70a(5), if a

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the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located . . .

(5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered; *Provided*, That rights of action ex delicto for libel, slander, injuries to the person of the bankrupt or of a relative, whether or not resulting in death, seduction, and criminal conversation shall not vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process: *And provided further*, That when any bankrupt, who is a natural person, shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; . . . .

transfer of that asset to the trustee interferes with the bankrupt's freedom after the date of his petition to accumulate new wealth. "Accordingly, future wages of the bankrupt do not constitute 'property' at the time of bankruptcy nor, analogously, does an intended bequest to him or a promised gift—even though state law might permit all of these to be alienated in advance." (*Segal v. Rochelle, supra,* 382 U.S. at 379-80.)

Vacation pay is analogous to future wages. The trustee agrees that such payments are like wages, but, he says, that part of those wages attributable to services rendered by the bankrupt before he filed his petition should be treated for section 70a(5) purposes as if they were regular accrued and unpaid wages antedating bankruptcy. The wage analogy breaks down if it is extended to the trustee's lengths. From the employee's standpoint, there is no similarity between earned wages that he will receive at the end of the week and bookkeeping entries showing vacation credits that he can convert to cash only when he takes a vacation or is laid off. Those earned credits are as inaccessible to him as the entries in his social security account before he reaches retirement age.[2]

We also reject the trustee's suggestion that we analogize "accrued" vacation pay to various kinds of future interests that are considered "property" passing to the trustee, such as an interest in a trust

[2]Contributions to retirement funds do not pass to the trustee. *E.g.*, Tennessee Valley Authority v. Kinzer (6th Cir. 1944) 142 F.2d 833.

the enjoyment of which is postponed to the future. Wages are simply not treated like income from a trust or like contingent remainders. Federal and state law impose an assortment of limitations on the amenability of wages to creditors' claims, by way of exemptions and otherwise, in recognition of the reality that depriving a workman of all or a substantial part of his wages will leave him and his family destitute (*E.g., see Sniadach v. Family Finance Corp.* (1969) 395 U.S. 337; *McCallop v. Carberry* (1970) ..... Cal.2d ..... [slip opinion Jan. 30, 1970]; Cal. Code Civ. Proc. § 690.11; Cal. Labor Code § 300.)

In reaching the conclusion that vacation pay credited to an employee's account before bankruptcy is not "property" within the meaning of section 70a(5), we are mindful that a contrary view would rarely benefit creditors. Instead, such funds when, if ever, received by the employee would usually be consumed by the expenses of administration incurred to keep the estate open awaiting the employee's vacation or his unemployment. But the overriding reason for our view is that an employee who will be without wages or on reduced wages during future layoffs or who will be without a vacation cannot be said to have been given the fresh start Congress intended him to have.

The Sixth Circuit has reached the same conclusion in *Tennessee Valley Authority v. Kinzer, supra,* 142 F.2d 833. We are not persuaded to the contrary by the rationale of the Fifth Circuit in *Kolb v. Berlin* (5th Cir. 1966) 356 F.2d 269.

The order is REVERSED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Tuesday, April 21st, 1970.

Before: HAMLEY, BROWNING, and HUFSTEDLER, Circuit Judges.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT

ORDERED that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk and that a judgment to be filed and recorded in the minutes of this Court in accordance with the opinion rendered.